

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL PENNEL, JR., Case No. 5:16cv02889
Akron, Ohio
Plaintiff, Wednesday, November 30, 2016

vs.

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION, ET AL.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

TELEPHONE CONFERENCE

APPEARANCES:

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1 P R O C E E D I N G S

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3 THE COURT: All right. Counsel, this is Judge
4 Adams. Can you all hear me?

14:15:01 5 For the record -- we will conduct this on the
6 record. For the record, the court has before it today Case
7 Number 5:16cv2889. The case is captioned Michael Pennel,
8 Jr., versus the National Football League Players
9 Association, the National Football League and the National
14:15:17 10 Football League Management Council.

11 We're here today for a conference to discuss an
12 outstanding motion for a temporary restraining order, as
13 well as a preliminary and permanent injunction, which is
14 sought by the plaintiff in this matter.

14:15:30 15 Before we go further, I would ask counsel to
16 identify yourselves and who's appearing for the record as we
17 are conducting this conference by telephone, and I would ask
18 when you are called upon to speak, that you identify
19 yourself before speaking for the benefit of the court
14:15:47 20 reporter.

21 Counsel, on behalf of Mr. Pennel.

22 MR. ZASHIN: Thank you, Your Honor. On behalf of
23 Mike Pennel, Stephen Zashin and Pat Hoban from Zashin &
24 Rich.

14:16:00 25 THE COURT: Thank you. On behalf of the National

1 violation of that provision here. It's simply -- the point
2 of that provision is to make sure that we have sufficient
3 arbitrators to hear these appeals.

4 In fact, what they're doing here runs directly
14:44:14 5 counter to the provision that they base their entire claim
6 on. They want you to enjoin the arbitration. They want to
7 have a lengthy federal court proceeding and, Your Honor,
8 what would be the result of that? The result of that would
9 be that they would be successful in frustrating our
14:44:32 10 collective bargaining agreement. They would be successful
11 in the improperly using the federal court to interfere with
12 what the -- what the Management Council and Mr. Pennel's own
13 union have agreed is that it's very important that these
14 appeals be resolved expeditiously so we have people
14:44:55 15 available every Tuesday. If he's available next Tuesday,
16 it's been assigned, and what they would be doing is
17 absolutely frustrating that --

18 THE COURT: With all due respect, let me ask you a
19 question.

14:45:06 20 What is the player to do in this case? What is
21 the plaintiff to do if, in fact, hypothetically management
22 and his union have chosen to either ignore or unilaterally
23 decide not to abide by a provision in their agreement,
24 because that's the argument they're making.

14:45:28 25 They're saying, "Judge, here's why we're here is

1 because management and the union have agreed they will not
2 follow the specific provisions set forth in this policy, and
3 they have told us that they have modified or agreed to a
4 modification which we have not yet seen, which is not" -- at
14:45:50 5 least no one has told me is in writing. No one has told me
6 there's been -- "The proper protocol has been followed in
7 getting the approval of the modification. So, therefore,
8 Judge, where else can we go besides a federal court," if, in
9 fact, the parties, again, hypothetically, their argument is
14:46:07 10 that you have, you and the union, have chosen to modify this
11 agreement in some fashion?

12 If that's the case, then, again, where else are
13 they going to go, and what other modifications may have been
14 agreed to between the union and management that the players
14:46:26 15 are either unaware of or hasn't been -- protocol hasn't been
16 followed?

17 So, you know, isn't that sort of a slippery slope?

18 MR. NASH: Your Honor, with respect, no. The
19 answer -- and I can give this to you as someone who's been
14:46:41 20 practicing labor law for a very long time. It's very clear
21 that an employee in this situation goes to the dispute
22 resolution procedures under the collective bargaining
23 agreement. They go to the arbitrator. He's free to make
24 this argument to the arbitrator, and, again, what we're
14:47:00 25 talking about is a dispute over how to interpret the

1 process. The hearing is scheduled -- it is supposed to be a
2 very short period of time. It is not just that they
3 thoroughly commenced the arbitration. They've submitted --
4 we already have a dispute over their discovery request that
14:54:00 5 should be submitted to the arbitrator, not to you, frankly,
6 with all due respect. You can't come into federal court
7 because you're not happy with the way the arbitration is
8 going.

9 THE COURT: Wait a minute.

14:54:11 10 MR. NASH: This is in a short period of time. The
11 arbitration is scheduled to be next Tuesday.

12 THE COURT: With all due respect, have you
13 provided, in terms of, again, I recognize -- let me back up.

14 I recognize the limitations that generally appear
14:54:25 15 to cases of this nature and the court's involvement in
16 disputes of this nature. I recognize fully those
17 limitations, but I am intrigued by the idea, given the
18 stakes here at issue, given -- again, repeating myself a
19 bit, given the fact that this individual may lose his
14:54:46 20 playing career as a consequence, I am intrigued by whether
21 or not, again, you can ignore the plain language of the
22 parties' agreement, which, with all due respect, sounds as
23 if you said, "We have basically come to some other agreement
24 that we will not follow the plain language of our
14:55:10 25 agreement."

1 And repeating myself a bit again, "and that we now
2 have allegedly some oral agreement, in essence, agreeing to
3 not follow the plain language of your arbitration
4 provision."

14:55:26 5 Now, if that's not something for the federal court
6 to get involved in, then, again, I may be mistaken. I am
7 going to have to review some of the case law, but that
8 intrigues me as to how and why you can go about doing that.

9 And I am -- candidly, I'm going to ask directly.
14:55:41 10 Have you shared with the plaintiff all the specifics about
11 the modification that has supposedly been agreed to, the
12 writings, the memoranda, the agreement of the union, we're
13 going to agree not to follow that provision, has that all
14 been shared with the plaintiff? Yes or no?

14:56:00 15 MR. NASH: Well, Your Honor, I don't agree with
16 the premise that there's a modification. Again --

17 THE COURT: I am sorry. I thought I just heard
18 that.

19 MR. NASH: I'm sorry, Your Honor. I don't agree,
14:56:12 20 and what I was trying to explain earlier is if we were in
21 the proper forum, that is, if the arbitration proceeds as it
22 should, we would be arguing about this to the arbitrator,
23 the points that you're --

24 THE COURT: Sir, are there three to five as the
14:56:29 25 provision provides?

1 MR. NASH: The provision provides -- yes, there
2 are, to make sure that there are sufficient arbitrators.

3 THE COURT: No, no. Is there three to five as the
4 plain language provides? Unless I missed something, and
14:56:47 5 there's a court reporter here, I will go back and read it, I
6 thought the position of the parties was or that the position
7 of the defendants was, "Well, no, we didn't comply with that
8 provision, because we reached a modification with the union
9 that it wouldn't be necessary to have the three to five
14:57:07 10 because there are so few of these hearings."

11 Am I mistaken?

12 MR. NASH: That's correct, Your Honor.

13 THE COURT: So back to my original point -- excuse
14 me. Excuse me. Back to my point.

14:57:19 15 Did you provide to the plaintiff all of the
16 pertinent documents verifying this agreement between
17 management and the union related to this provision? Yes or
18 no?

19 MR. NASH: Your Honor, we have provided them with
14:57:38 20 -- I can't speak to every document that's been provided in
21 response to their discovery request.

22 THE COURT: Well, Counsel, it sounds like we need
23 a hearing on this issue, because, I'm sorry, with all due
24 respect, that's kind of the basic thing that you would
14:57:54 25 provide informally.

1 That's what I strongly suggest you do.

2 Because, otherwise, we're going to have a hearing
3 on Monday. I have a jury trial starting on Tuesday. I will
4 be picking a jury on Tuesday.

15:02:30 5 And I will be busy preparing for a criminal trial
6 that's likely to take a week. I don't know how long it's
7 going to be. It's somewhat complex.

8 So if need be, absent some agreement to continue
9 this arbitration hearing scheduled for Tuesday, to allow me
15:02:47 10 a full opportunity to hear arguments, and maybe something
11 can be decided on the briefs. It may not. So, otherwise,
12 we will have some sort of hearing on Monday so that I can
13 have as much information as possible, decide the issues in
14 fairness to the plaintiff and the defendants, as well. The
15:03:05 15 stakes for the plaintiff are extremely high.

16 And as to the last set of arguments, Counsel, I
17 guess I am a bit surprised by the argument that you have an
18 agreement that says that these are the terms of the
19 agreement. They're valid and they're binding, but we can
15:03:22 20 modify the agreement and we don't have to disclose the
21 modification to anyone essentially.

22 That argument strikes me -- if that's the argument
23 you're relying on, then that's something that cries out for
24 some sort of hearing. Again, I guess my head is spinning
15:03:37 25 that you can enter into an agreement and make a modification

1 and then not disclose it to anyone. I mean, the plaintiff
2 is subject to the terms of this agreement. And if, in fact,
3 you've reached some modification with the union and then to
4 say to the plaintiff, who is subject to the arbitration, is
15:03:53 5 not entitled to know about the modifications that we've
6 reached and the details of same, strikes me as almost a lack
7 of fundamental fairness, and I just quite frankly don't
8 understand that argument.

9 So you can if you would like to confer and decide
15:04:10 10 whether or not you wish to agree to some stay of this or
11 modification of the arbitration date for 30 days. That
12 would be my suggestion.

13 And I can conduct my criminal trial and get that
14 matter out of the way, clear the decks. And we have a
15:04:25 15 holiday season. It's a difficult time for all involved, but
16 that's my suggestion.

17 Otherwise, I will take the matter -- we will take
18 up the matter for Monday on a hearing and I am going allow
19 the plaintiff potentially some limited discovery. I think
15:04:39 20 they're entitled to it, and at least that's my current
21 thinking absent some agreement between the parties. I
22 strongly suggest you reach some accomodation in that regard
23 so that the matter can get all the attention it deserves and
24 everyone can be fully heard, and I can have the benefit of
15:04:56 25 everyone's argument and be better prepared than I have been

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled
matter.

s/Lori A. Callahan
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